

CCASE:  
MSHA & UMWA V. CONSOLIDATION COAL

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
September 30, 1982  
SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

Docket No. HOPE 75-680  
IBMA 75-39, 75-40

and

UNITED MINE WORKERS  
OF AMERICA  
on behalf of Howard Mullins

v.

CONSOLIDATION COAL COMPANY,  
Successor to Pocahontas Fuel Company

#### ORDER

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., (1976). On the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1976 and Supp. IV 1980), an appeal from a December 20, 1976, decision of the Department of Interior's Board of Mine Operations Appeals was pending in the United States Court of Appeals for the District of Columbia Circuit. On December 31, 1980, the Court issued its decision reversing the decision of the Board and remanding for further administrative proceedings. Mullins and UMWA v. Andrus, Secretary of Interior, 664 F.2d 297 (D.C. Cir. 1980). 1/ In its decision the Court observed that in light of the enactment of the 1977 Mine Act "while our remand is technically to the Secretary [of Interior], further proceedings to comply with this opinion will automatically take place before the [Federal Mine Safety and Health Review] Commission." 664 F.2d at 310 n. 116.

Shortly after the issuance of the Court's mandate, the Commission issued an order remanding the case to the administrative law judge for "further appropriate proceedings" in light of the Court's decision. 3 FMSHRC 2043 (Sept. 1981). Less than two weeks after this remand, and apparently without briefing or argument from the parties, the judge issued his decision. 3 FMSHRC 2308 (Oct. 1981)(ALJ). On November 13, 1981, we granted the petition for discretionary review of

the judge's decision filed on behalf of Howard Mullins by the United Mine Workers of America. 30 U.S.C. § 813(d)(2).

1/ The Court's mandate was not issued, however, until August 21, 1981.

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That petition requested review of "a single question" presented by the judge's decision. The petitioners asserted that "the administrative law judge did not comply with the Court of Appeals' instruction to compute the amount due and payable to Mr. Mullins." The petition also stated that because of the manner in which the judge proceeded on remand, "petitioners' counsel has had no opportunity to file an application for whatever costs and attorneys' fees may be due Mr. Mullins and/or the UMWA, and no such costs or fees were awarded," and requested a summary remand to the judge to "compute the amount due Mullins' as required by the Court of Appeals." The petition concluded by framing the question presented:

Did the ALJ err, and fail to comply with the Court of Appeals' remand order, by failing to compute any amounts due Mr. Mullins, and instead leaving computation of said amounts to agreement of the parties?

On review Mullins and the UMWA submitted a two-sentence brief incorporating the petition for review as their brief and noting "that the Court of Appeals went to great length to have this case decided without issuance of a closure order." Consolidation Coal Company (Consol) submitted a brief as the successor to Pocahontas Fuel. It opposes the request for a remand to the judge. In Consol's view the adjudicative process, triggered by its application for review of the notice of violation, has been brought to an end by the Court's finding that the alleged violation in fact occurred. Consol submits that because the abatement period was suspended pending final administrative action on the question of violation, the appropriate course at the present time is for the Secretary to determine the rate of pay he believes is appropriate and to set a new period in which abatement must be accomplished. Thereafter, if abatement is not accomplished by paying Mullins the amount he is due, Consol suggests that a failure to abate withdrawal order would be appropriate. Consol dismisses Mullins' request for further proceedings to determine costs and attorneys fees, stating that such an award is not authorized in this proceeding.

In a two-page brief the Secretary of Labor submits that "it is clear that the D.C. Circuit instructed this Commission to compute the amount that Mullins should receive from Consol. Administrative law judges of this Commission routinely determine amounts of back pay and interest due to complainants after both complainants and respondents have briefed the issues relating to such awards."

The Court of Appeals has determined that compensation at the lower rate was impermissible, and although Mullins was officially "classified" as a laborer at the time of his transfer, based on the stipulations of fact in the record the "regular rate of pay" that Mullins received "immediately prior to his transfer, in fact exceeded the laborer's classification rate. The Court did not determine, however, what the "regular rate of pay" received by Mullins "immediately prior to his transfer" actually was, i.e., the Court did not establish a precise dollar figure at which Mullins should have been compensated after his transfer. The Court observed that the appropriate rate was at least greater than the \$42.75 per shift rate due a laborer, but not necessarily the \$47.25 per shift rate due a roof bolter. The Court left the precise rate due Mullins to be resolved as an "administrative function."

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We have carefully reviewed the Court's decision, the judge's decision, and the arguments of the parties concerning the appropriate forum and method of resolving the question remaining in this case. For the reasons that follow, we reject the judge's rationale and the operator's argument that the Commission has no present role to play in the further administrative proceedings ordered by the Court. In the joint "Stipulation of Issues" submitted to the administrative law judge at the outset of this litigation the parties framed the issues to be decided in the administrative adjudicative proceeding as follows:

- (1) What is the meaning of the phrase "regular rate of pay received by him immediately prior to his transfer" as used in section 203(b)(3) of the Act?
- (2) Given the meaning accorded the phrase of section 203(b)(3) set forth above and based on the facts stipulated by the parties, is Pocahontas in violation of section 203(b)(3) of the Act?

The Court of Appeals has resolved the second question: Pocahontas violated the Act by paying Mullins at the general inside laborer's rate after his transfer. The parties have also been given a partial answer to their first stipulated issue: "'The regular rate of pay' is the dollar rate - the rate at which the miner was actually remunerated for the work he did - irrespective of his job classification" (664 F.2d at 299); Mullins' entitlement was the rate of compensation actually and regularly received immediately prior to his transfer, and not the lower rate of a general inside laborer" (664 F.2d at 307); "the phrase 'regular rate of pay' in the pay-maintenance section means the rate at which the transferring miner was actually and regularly compensated when the transfer occurred" (664 F.2d at 310); and "Mullins became legally

entitled to compensation for his post-transfer work at not less than the rate at which he was actually and regularly paid immediately prior to transfer" (Id.). 2/

Two "interstices in the statutory formula" identified by the Court (664 F.2d at 310 n. 117) remain to be filled: (1) what period of time constitutes the time "immediately prior" to Mullins' transfer, and (2) what was the "regular rate of pay" received by Mullins during this period?

Following resolution of these two questions, a precise dollar amount must be awarded to Mullins before this administrative adjudication is completed. Absent a specific monetary award based on Mullins' "regular rate of pay" "immediately prior to" his transfer, little relief will have been afforded the affected miner after eight years of litigation. The Court specifically ordered computation of the amount due Mullins. This should be done on the remand herein ordered.

2/ The questions and issues resolved by the Court are now the law of the case.

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Although the Court observed that "[t]he occasion for remand is not a need for additional evidence or fact-finding" (664 F.2d at 310 n. 117), this dictum statement made in passing cannot be read as a bar to further proceedings if such, in fact, are necessary to finally resolve this dispute. Because the parties heretofore have not focused on the precise questions remaining, we are of the view that opportunities for further briefing from the parties on the meaning of the phrase "regular rate of pay ... immediately prior to transfer", and its application to the facts of this case, should be had before a fully adequate decision can be made by the judge. In light of the significant passage of time since this litigation began, further evidence, perhaps stipulated, as to the amounts that Mullins had actually received and the amounts due will be necessary before a final award can be made.

The case is remanded to the administrative law judge for further proceedings consistent with this decision. Specifically, if the parties find that further litigation, rather than an appropriate settlement of this case, is necessary, further briefs from all parties on the meaning of the phrase "regular rate of pay ... immediately prior to his transfer" and its application to the facts of this case shall be submitted, and a specific determination of the amount due Mullins must be made. We further order that the proceedings on remand be expedited. 3/

A. E. Lawson,  
Commissioner

3/ Commissioner Backley took no part in the consideration or

disposition of this case.

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